

**June 18, 2003**

## **COURT RULES THAT DETAINEE INFORMATION CAN BE WITHHELD FROM DISCLOSURE**

*(Center for National Security Studies v. Dep't of Justice)*

The Washington Legal Foundation (WLF) scored a major victory when the United States Court of Appeals for the District of Columbia Circuit upheld the decision by the Department of Justice to withhold the public release of the names and certain other information about the aliens detained in the United States following the September 11, 2001 terrorist attack on America. In a 2-1 decision, the court agreed with WLF that releasing the information could interfere with law enforcement efforts, and that the government was not otherwise required by law to disclose the information. WLF filed briefs in the case on behalf of itself and its client, the Jewish Institute for National Security Affairs (JINSA).

In this case, some two dozen activist groups, including the ACLU, the Center for Constitutional Rights, People for the American Way, National Association of Criminal Defense Lawyers, Amnesty International, and the Multiracial Activist, filed a Freedom of Information Act (FOIA) request in late 2001 with DOJ seeking to obtain the names of all aliens who were arrested or detained in connection with the DOJ's investigation of the terrorist attack, as well as the names of any of their attorneys. The groups also sought the release of related information, such as the dates of the aliens' arrest or detention, and the location of the facilities in which they were detained.

DOJ responded by releasing the information with respect to those aliens who were criminally charged, but withheld the names of approximately 750 detainees administratively charged with violating Immigration and Naturalization Service (INS) laws and regulations. However, DOJ did release other information about the INS detainees, such as their country of origin, the date they were charged with an INS violation, and the specific provision of the INS law that they were charged with violating. DOJ defended its refusal to release the names on the grounds that their release could jeopardize the ongoing investigation by revealing to the al Qaeda terrorist network the identity of those aliens of special interest to law enforcement. Releasing the names could endanger the safety of the public and the detainees, and constitute an unwarranted invasion of privacy, particularly for those detainees who were initially held, but then released after further investigation. All detainees and their lawyers were free to talk to the press about their arrest and conditions of their detention, and some have done so.

Last August, the federal district court judge ordered the DOJ to release the names of the

detainees, but gave an opportunity for the aliens to "opt out" of the required disclosure by signing a statement that they do not wish to have their identity revealed. WLF argued in its initial appellate brief that FOIA does not require such a procedure, and that, in any event, it would be impractical to obtain the aliens' request for confidentiality because approximately 700 of the 750 aliens originally detained have since been deported, and their whereabouts unknown.

Although the trial court ruled against DOJ on the issue of releasing the names of the detainees, the district court upheld DOJ's refusal to disclose the dates of the arrests and places of detention or release. The district court agreed with DOJ and WLF that such information may enable terrorist groups to gather a "mosaic" of intelligence information that could harm our national security and the safety of individuals and the public. The district court also agreed with WLF that neither the common law nor the First Amendment entitled the activist groups to the information. The ACLU appealed that part of the lower court's decision.

On appeal, WLF reiterated its arguments that the activists were not entitled to the information requested under FOIA, the common law, or the First Amendment. Judge Sentelle, writing for the court of appeals, agreed with WLF, ruling that the release of the names could be expected to reasonably interfere with law enforcement activities, particularly in the context of America's ongoing war on terrorism. The court also agreed with WLF that the First Amendment does not entitle the ACLU to receive the information, and that the common law right to public records has been replaced by Congress with the Freedom of Information Act, at least with respect to those documents in the hands of the Executive Branch.

Judge Tatel dissented on the FOIA issue, arguing that while the information may indeed be subject to withholding, the government's affidavit was not specific enough in demonstrating the harm to national security. Judge Tatel did not dissent from that part of the majority's opinion on the alternative grounds pressed by the ACLU to obtain the information, namely, the applicability of the First Amendment or common law to this situation. The ACLU is considering whether to appeal the three-judge panel decision to the full D.C. Circuit, or to seek U.S. Supreme Court review. Either way, WLF will continue to participate in the case in order to ensure its victory.

Over the years, WLF has been the only prominent public interest law and policy organization that has actively litigated high-profile cases supporting national security, anti-terrorism, and immigration related issues.

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